No. 10965

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

MABEL HELEN LOWERY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

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BRIEF OF APPELLEE

STATEMENT OF THE CASE

The defendant was indicted in five counts of the indictment. The first two counts accused the defendant of selling opium prepared for smoking not in or from the original stamped package. The defendant was acquitted as to these two counts, the only testimony as to the sale being from a confessed prosti-

tute and narcotic addict, and the time of sale being somewhat remote from the time alleged in the other counts in the indictment.

Count III accused the defendant with a purchase of 400 grains of opium not in the original stamped package, and Count V accused the defendant of receiving 410 grains of opium after importation, contrary to law. The defendant was acquitted as to Counts I, II, III and V.

Count IV accused the defendant of purchasing 10 grains of opium, prepared for smoking, not in the original stamped package. The jury returned a verdict of guilty as to Count IV. A motion for a new trial and a motion in arrest of judgment were duly made (Tr. 8 and 9) and denied by the Court. Judgment and sentence was entered and the defendant was sentenced to eighteen months in the Federal Reformatory for Women at Alderson, West Virginia, on Count IV of the indictment (Tr. 11). From this judgment and sentence this appeal is prosecuted.

STATEMENT OF FACTS INVOLVED

The evidence in this case shows that on May 5, 1944 certain Federal Narcotic Agents arrested a Chinese named Mar Gim Wing. He was taken to the Federal Narcotic Office at the United States Court

House in the city of Seattle. Before entering the United States Court House Building the defendant gave the officers a 50 fun jar of opium (Tr. 19) which Mar took from his pocket. While under questioning Mar Gim Wing told the officers that he was making a delivery of opium to the defendant, Mabel Lowery. The officers then allowed Mar Gim Wing, at Mar's own suggestion, to go through with his arrangements of delivering the jar of opium to Mabel Lowery. There was some discussion between the officers and Mar as to the method of delivering the opium. However, the evidence shows that most of the suggestions as to the delivery were made by Mar (Tr. 23, 27), the officers desiring to witness the delivery, which had been previously arranged between Mar Gim Wing and the defendant Mabel Lowery. Mar used a car given to him by the Narcotic Agents for the purpose of making the delivery of the opium to Mabel Lowery. When arrested Mabel Lowery was in the above mentioned automobile which Mar was driving. The evidence as to the completeness of the delivery of the 50 fun jar of opium was very much in conflict (Tr. 24, 27, 31, 36, 42).

Upon search of the purse of the defendant, Mabel Lowery, the opium mentioned in Count IV of the indictment was found in a powder puff bag.

QUESTION PRESENTED

The appellant states the question presented to be "if the evidence shows that a defendant is addicted to the use of narcotics and has been arrested under facts proving as a matter of law that Federal Officers had illegally entrapped the addict into committing an offense, can such addict then be convicted because of a small quantity of narcotic drugs taken from her purse at the time of such illegal arrest?" The appellee does not agree that this is the question presented. However, since that is the only question raised by the appellant, that is the question which will be discussed in this brief.

ARGUMENT

The firse sentence of the appellant's brief states "In order for the appellant to be successful in this appeal, Your Honors must be convinced that the situation here amounts to entrapment as a matter of law." (Appellant's Brief, Page 4). Further, in the argument of appellant, Brief, Page 5, it is stated that the test laid down is that if a criminal idea originates in the defendant's own mind, then the acts of the Federal Officers seeking to obtain evidence against such a defendant would not be entrapment. It is the evidence as shown in the transcript and in the state-

ment of facts herein that there had been a preconceived and prearranged plan between Mar Gim Wing, the Chinese, and the defendant, Mabel Lowery, to violate the law, and that the Federal Officers did nothing but permit the prearranged plan to continue until such time as the defendant, Mabel Lowery, became a law violator, and this only as to the 50 fun jar which was the opium mentioned in Counts III and V of the indictment. The opium mentioned in Count IV of the indictment, which is the only count to which the jury returned a verdict of guilty, had no part of the prearranged plan between Mar Gim Wing and the defendant, Mabel Lowery, and in which the appellant claims entrapment. The defendant obtained the benefit of any claim of entrapment by the instruction on entrapment given by the trial judge. The said instruction on entrapment gave the full benefit of any such claim to the defendant and there is no one now to state whether or not it was this instruction or the conflict in the evidence regarding delivery of the opium or what reason caused the jury to bring in a verdict of not guilty as to Counts III and V.

The 10 grains of opium mentioned in Count IV of the indictment and which are testified to (Tr. 18) as 8 grains of opium by the Government chemists,

were never part of the prearranged plan and since there is no conflicting testimony must have been in the defendant, Mabel Lowery's possession at all times and until found by the Narcotics Officers.

There never was a motion to suppress Exhibit 4 of the evidence, and even if well taken, which fact is denied, comes too late. *(Clark vs. United States*, 245 Fed., 112; *Alvarado vs. United States*, 9 Fed. (2d) 385).

The whole argument of appellant seems to be that no user of narcotics should be offered narcotics, and because of the users' weakness in accepting said narcotics there should be no conviction. This argument is not properly a part of the present case since the part of the indictment which alleged narcotics which had been in Government custody is not a part of this appeal.

Count IV of the indictment, which is the only part of the indictment subject to review here, mentions only narcotics which had no part of the transaction involving the handling of narcotics by Federal Officers.

The appellant's brief, page 8, states that "the writer believes that almost any steps are justifiable for the purpose of putting a narcotic peddler out of

business." It is to be noted here that the first two counts of the indictment, on each of which a verdict of not guilty was returned, charged the defendant, Mabel Lowery, with the sale of opium. There was no error in failure to sustain the defendant's challenge to the legal sufficiency of the evidence and the defendant then proceeded to introduce evidence on behalf of the defendant. *(Clark vs. United States*, 245 Fed., 112.)

One who has not engaged in, and had not recently been engaged in, violating the law, and who had no present intention of violating it, may not, through *sympathetic* appeals, or other *impelling* machinations of officers or so-called stool pigeons, be induced to commit a crime, and then be prosecuted and convicted for committing it. *(Cain vs. U. S.*, 19, Fed. (2d) 472).

In the case at bar, there was no stool pigeon, there was another defendant, Mar, who later pleaded guilty (Tr. 18), who was permitted at his own suggestion to go through with a preconceived and prearranged deal in opium with the defendant Mabel Lowery. Thus came the instruction on entrapment to the jury. *(DiSalvo vs. United States*, 2 Fed. (2d) 222; *Cermack vs. United States*, 4 Fed. (2d), 99).

This instruction was given over the objection of

the Government and a verdict of not guilty was returned as to Counts III and V.

Even where facilities for commission of a crime are placed in the way of one suspected of a willingness to commit it, such facilitating or affording an opportunity to commit a crime is not a defense to the perpetrator of it.

Aultman vs. United States, 289 Fed. 251;
United States vs. Poppagoda, 288 Fed. 214.

There is no entrapment where there is no persuasion or coaxing.

Sauvain vs. United States, 31 Fed. (2d), 732.

Now, having received the benefit of the instruction and only being convicted on Count IV involving 10 grains of opium found in a powder puff bag, the defendant now asks that this evidence be suppressed, no such motion having been made at any time heretofore. Without conceding the merit of such motive, the raising of such a question on appeal is untimely. The case cited by defendant is not in point with this case.

Paine, et al, vs. United States, 7 Fed. (2d), 263.

There has been no miscarriage of justice in this case and the evidence in the Court receiving the ver-

dict of guilty was not put in circulation by Narcotic Officers.

CONCLUSION

It is respectfully submitted that the trial court acted correctly in denying the challenge to the legal sufficiency of the evidence and motion for a directed verdict made at the conclusion of the Government's case and at the end of all evidence as to Counts III, IV and V. Therefore the judgment should be affirmed.

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